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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 275

PANHANDLE EASTERN PIPE LINE COMPANY,
Petitioner,

vs.

FEDERAL POWER COMMISSION, CITY OF DETROIT, COUNTY OF WAYNE, MICH., MICHIGAN CONSOLIDATED GAS COMPANY, AND MICHIGAN PUBLIC SERVICE COMMISSION,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

IRA LLOYD LETTS,
JOHN S. L. YOST,
E. H. LANGE,
RUSSELL VOERTMAN,
Counsel for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Panhandle Eastern Pipe Line Company, a Delaware corporation (herein referred to as "Panhandle"), prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered in the above cause on April 5, 1946, denying the prayer of Panhandle to be relieved of those terms and provisions of a stay order, theretofore issued by said court on December 7, 1942, which, contrary to the principles

of law upon which the decision of this Honorable Court in *Central States Electric Company* v. *City of Muscatine,* 324 U. S. 138 rests, require Panhandle to bear the expense of distributing to ultimate consumers, not in privity of contract with Panhandle, funds collected by Panhandle from distributing utilities selling gas to such ultimate consumers, which funds were impounded pursuant to said stay order pending review of an order of the Federal Power Commission requiring Panhandle to reduce its rates for natural gas sold to such distributing utilities.[1]

Opinions Below

The opinion of the majority of the court below[2] and the dissent thereto[3] filed April 5, 1946, are officially reported in 154 F. (2d) 909.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on April 5, 1946.[4] Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (Title 28, U. S. C., Section 347(a)).

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[1] The order of the Federal Power Commission was directed against Panhandle, Illinois Natural Gas Company and Michigan Gas Transmission Corporation. The two latter corporations were subsidiaries of Panhandle Eastern Pipe Line Company and were dissolved May 31st, 1943, after Panhandle Eastern had acquired all of their properties, so that of the three original petitioners which instituted these proceedings below, Panhandle is the only party in interest here. Federal Power Commission Opinion No. 80 and Order Reducing Rates (R. 37).

[2] *Panhandle Eastern Pipe Line Company, et al.* v. *Federal Power Commission, et al.,* 154 F. (2d) 909-912 (R. 489).

[3] *Panhandle Eastern Pipe Line Company, et al.* v. *Federal Power Commisison, et al.,* 154 F. (2d) 909, 912,913 (R. 495).

[4] Judgment of the lower court dated April 5, 1946 (R. 497).

Statute Involved

The pertinent provisions of the Natural Gas Act, approved June 21, 1938 (52 Stat. 821, 15 U. S. C. 717) are set forth in the appendix hereto (pp. 25-30).

Questions Presented

(1) Where a natural-gas company has sought review by a Circuit Court of Appeals of the United States, pursuant to Section 19(b) of the Natural Gas Act, of an order issued by the Federal Power Commission directing such natural-gas company to reduce its rates for natural gas sold to distributing utilities for resale for ultimate public consumption, and such reviewing court has ordered a stay of the Commission's order upon the condition that the natural-gas company shall deposit monthly with a custodian appointed by the court the difference between payments to the natural-gas company by such distributing utilities under existing rates and those required under the order of the Commission, may such reviewing court, consistently with the provisions of the Natural Gas Act and with the provisions of Article V of the Amendments to the Constitution of the United States, impose as a further condition of such stay the requirement that, if the Commission's order is sustained, the natural-gas company shall bear, in addition to all costs and expense of impounding, the expense of distributing such impounded funds to ultimate consumers, such ultimate consumers being persons not in privity of contract with the natural-gas company but purchasers of gas from local distributing companies whose rates are subject only to state regulation?

(2) Where, in the situation described in Question (1) above, the reviewing court reserved full power and jurisdiction to cancel or modify the stay order, and, after the

rate reduction order of the Commission has been sustained on review, the natural-gas company applies for modification of the stay order removing the requirement that the natural-gas company bear the expense of distribution of the impounded fund to ultimate consumers, may the reviewing court consistently with the provisions of the Natural Gas Act and with the provisions of Article V of the Amendments to the Constitution of the United States, although modifying the stay order in certain respects, still require the natural-gas company to bear a substantial part of the expense of distributing the impounded funds to ultimate consumers?

(3) Where, in the situation described in Questions (1) and (2) above, the reviewing court rests its jurisdiction to distribute the impounded funds on disclaimers of interest therein filed by distributing utilities whose excess payments to the natural-gas company contributed to the impounded fund, may the expense of distributing the excess charges collected from such utilities, and impounded, to ultimate consumers served by such utilities so disclaiming be imposed upon the natural-gas company?

(4) Whether the imposition upon petitioner by the court below of the major part of the expense of distributing impounded funds to ultimate consumers, not in privity of contract with petitioner and whose respective interests in the fund are indirect, remote and speculative in amount, constituted an abuse of discretion by reason of its severity, its inequity, and its tendency to impair the right of access to the courts?

Statement

The proceedings in the court below which resulted in the entry of the judgment of April 5, 1946, review of which is sought here, took place after the remand of this case by

this Honorable Court following its decision in *Panhandle Eastern Pipe Line Company, et al.* v. *Federal Power Commission, et al.*, 324 U. S. 635, and its denial of rehearing therein, *325 U. S. 834.*

On September 23, 1942, the Federal Power Commission entered its order requiring petitioner [5] to file new schedules of rates and charges for, and in connection with, its transportation and sale of natural gas in interstate commerce for resale for ultimate public consumption, so as to reflect, when applied to its 1941 transportation and sales, a reduction of not less than $5,094,384 per annum below its 1941 gross operating revenues of $17,789,573.[6]

After the Federal Power Commission had denied petitioner's motion for re-hearing and reconsideration and its application for a stay order pending court review,[7] petitioner applied to the court below for review of the Commissions's order [8] and for a stay of the Commission's order pending review.[9]

The Federal Power Commisison and other respondents urged that the court impose, as a condition of the stay, the requirement that Panhandle pay the expense of distribution to ultimate consumers if the rate reduction order should be sustained.[10] Panhandle contended that such matters should be reserved for determination after final court

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[5] See footnote No. 1.

[6] See footnote No. 1.

[7] Order of Federal Power Commission denying petitions for rehearing and for stay in Dockets Nos. G-200 and G-207 (R. 52).

[8] Petition of Panhandle Eastern Pipe Line Company, et al. to review and set aside the order of the Federal Power Commission (R. 1-42).

[9] Petition of Panhandle Eastern Pipe Line Company, et al. for stay of order of Federal Power Commission of September 23, 1942 (R. 53-74). See also Supplemental Petition of Panhandle et al. for stay of order pending review (R. 86-88).

[10] Suggestions made by Federal Power Commission to the lower court with reference to terms of proposed stay order (R. 75-81, 84-85).

review of the rate reduction order. After hearing all parties, the court below entered a stay order on December 7, 1942 [11] which required Panhandle to deposit monthly with the custodian appointed by the court the "difference between payments to petitioners under existing rates or arrangements and those required under the order of the Commission" and also provided that "the entire expenses of impounding (including, among other things, protecting, investing, and distributing to petitioners or to ultimate consumers) of these funds shall be borne by petitioners." The stay order provided, however, that "whether any earnings on such funds (while so impounded) may be applied upon such expenses is reserved for future determination" and contained the further provisions that "full power and jurisdiction is reserved to cancel or modify this order and to enter any other orders (with or without application of the parties) to protect or to promote the rights and interest of the parties to this litigation and of the ultimate consumers financially interested in the impounded funds."

The mandate of this Honorable Court sustaining the rate reduction order of the Federal Power Commission was filed in the court below on May 25, 1945,[12] and Panhandle, in compliance therewith, promptly filed with the Federal Power Commission new schedules of rates and charges. After holding a public hearing with respect to the new rates, the Federal Power Commission entered its order on November 2, 1945, allowing the new rates, as revised in the course of the proceedings before the Commission with respect thereto, to become effective with respect to all bills

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[11] Order of lower court dated December 7, 1942, granting stay of order of Federal Power Commission dated September 23, 1942 (R. 119-120).

[12] Mandate of Supreme Court of the United States dated May 25, 1944 (R. 144-146).

rendered by Panhandle to its utility customers on or after November 1, 1942.[13]

While the case was pending before the court below and in this Court, Panhandle made monthly deposits to the custodian in amounts approximately equivalent to the excess charges collected from the utilities purchasing gas from Panhandle for resale. After the new rates and schedules were made effective by the order of the Commission of November 2, 1945, the exact amounts of refunds due, respectively, to each of the distributing utilities which purchased gas from Panhandle during the impoundment period were computed by Panhandle, confirmed by such distributing utilities, respectively, and a report thereof made to the court below and to its custodian by the Federal Power Commission [14] and by Panhandle.[15]

The aggregate amount of these refunds due to the distributing utilities was $24,858,954.72, and the aggregate amount of the monthly payments made by Panhandle to the custodian was $24,307,475.99. The difference, amounting to $551,478.73, was paid to the custodian by Panhandle before December 28, 1945.[16]

On December 12, 1945, the court below, upon the petition of the United States of America representing that it had a substantial interest in the impounded fund as a consumer

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[13] Letter of Leland Olds, Chairman of F.P.C., to Hon. John B. Sanborn, U. S. Circuit Judge, December 26, 1945, and Summary attached thereto (R. 169-171).

[14] Letter of Leland Olds, Chairman of F.P.C. to Hon. John B. Sanborn, U. S. Circuit Judge, December 26, 1945 (R. 169-171).

[15] Memorandum of Custodian of Impounded Funds, Exhibit "B", tentative estimate of impounded funds (R. 478, 488A). See also Response of Panhandle Eastern Pipe Line Company to Order to Show Cause, Exhibit "A", summary showing amount of refund associated with sales by Panhandle to each gas utility, etc., resulting from application of rates accepted by Federal Power Commission, etc. (R. 163, 167-168).

[16] Response of Panhandle Eastern Pipe Line Company to order to show cause, etc. (R. 163, 442, 447).

of natural gas sold by distributors purchasing from Panhandle, and also as an indirect consumer through its war contracts, issued its order to show cause, dated December 12, 1945,[17] requiring the original parties to the cause and the distributing companies purchasing gas from Panhandle during the impoundment period to appear on December 28, 1945, at the United States Court House in Kansas City, Missouri, and to show cause, among other things, why an order should not be made distributing the impounded funds to the ultimate consumers who purchased gas from said distributing companies during the impoundment period. On or before the date of the hearing, December 28, 1946, some of the distributing companies filed claims to their respective interests in the impounded fund[18]; some disclaimed all interest in the fund[19]; some filed conditional disclaimers[20]; and others made no response.

Panhandle duly filed its response to the order to show cause and included in such response a prayer that the stay order entered on December 7, 1942, be modified by elimi-

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[17] Order of lower court to show cause why impounded funds should not be distributed, etc., December 12, 1945 (R. 146-147).

[18] Examples of these are claims by East Ohio Gas Company in the amount of $2,802,021.78 (R. 180-187), by Kentucky Natural Gas Company in the amount of $387,601.31 (R. 248-256), and by Ohio Fuel Gas Company in the amount of $629,919.72 (R. 223-246). See also Motion and intervening Petition of East Ohio Gas Company (R. 374-426).

[19] All of the important "disclaimers" such as, for example, those of Michigan Consolidated Gas Company in the amount of $10,954,509.52 (Detroit Area) (R. 307-308), Central Illinois Light Company in the amount of $1,432,298.73 (R. 272-273), Public Service Company of Indiana in the amount of $1,100,222.51 (R. 319-322), and Missouri Power and Light Company in the amount of $595,843.26 (R. 309-314) are actually "conditional disclaimers" in that the amounts to which they might otherwise be entitled are disclaimed upon the condition that the disclaiming company incurs no liability for state or federal taxes or for expenses of distribution to the ultimate consumers in connection with the amount so disclaimed. See also transcript of proceedings on December 28, 1945 (R. 440-447).

[20] See footnote No. 19.

nating therefrom all provisions requiring Panhandle to pay any part of the cost of distribution to ultimate consumers and that an order be entered fixing the reasonable cost of distributing the fund then in the hands of the custodian to the distributors whose names were set forth on an exhibit attached to said response, and providing that, upon payment of said amount and any unpaid court costs due the clerk of the court, Panhandle should be forever discharged from all obligation under the stay order entered on December 7, 1942.[21]

At the hearing on December 28, 1945, tentative views on the subject of distribution were expressed by various state commissions and interested parties, but no specific plan of distribution was advocated by any one. Conditions attached to some of the disclaimers were discussed.[22] The court continued the hearing over to March 1, 1946.

At the hearing on March 1, 1946, argument on petitioner's prayer for modification of the stay order was heard; representatives of various state commissions explained the plans for distribution which they, respectively, advocated[23]; and attorneys representing some of the distributors claiming an interest in the fund were heard.[24]

On March 12, 1946, the court entered its order appointing a Special Master herein[25] and on April 18, 1946, entered

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[21] Response of Panhandle Eastern Pipe Line Company to order to show cause December 28, 1945 (R. 163-168).

[22] Portions of transcript of proceedings on December 28, 1945, the return date of the order to show cause entered December 12, 1945 (R. 440-452).

[23] Illinois Plan (R. 455-461), Michigan Plan (R. 461-464), Indiana Plan (R. 464-467), Missouri Plan (R. 467-469), Kansas's Position (R. 471-473), Ohio's Position (R. 471-473), and Texas's Postion (R. 473).

[24] See appearances, proceedings of March 1, 1946 (R. 448-449).

[25] Order of lower court appointing Mr. George A. Heisey, of St. Paul, Minnesota as Special Master in Chancery (R. 474).

its order defining the powers and duties of the Special Master.[26]

On April 5, 1946, the majority of the lower court filed an opinion and order holding that the stay order of December 7, 1942, should be modified to provide that earnings on the impounded fund should be applied to the expense of distribution to ultimate consumers but denying the prayer of Panhandle to be relieved of any expense incident to the distribution of funds to ultimate consumers.[27] Judge Riddick filed a dissenting opinion expressing the view that none of the cost of distribution to ultimate consumers could lawfully be imposed upon Panhandle.[28] Thereupon the judgment,[29] review of which is sought here, was entered.

The report submitted by J. W. Perry, Court Custodian, on March 1, 1946, showed that the estimated cost of distribution to ultimate consumers was $1,157,150.[30] Earnings on the impounded fund were approximately $344,925.63.[31]

Reasons for Granting the Writ

(1) The court below has decided important questions of federal law which have not been, but should be, settled by this Court.

(2) The court below has decided federal questions in a way probably in conflict with applicable decisions of this Court.

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[26] Supplemental order of lower court relating to compensation, expenses, duties and procedure of Special Master (R. 475-478).

[27] See footnote No. 2, *supra*.

[28] See footnote No. 3, *supra*.

[29] See footnote No. 4, *supra*.

[30] Memorandum of custodian of impounded funds, Exhibit "B" (R. 488-A).

[31] Transcript of proceedings of December 28, 1945 (R. 442).

(3) The decision of the court below is in conflict with the decision of the United States Circuit Court of Appeals for the Seventh Circuit on the same matter.

(4) The court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's power of supervision.

Conclusion

For the foregoing reasons, stated more fully and supported by argument in the attached brief, it is respectfully submitted that the petition for a writ of certiorari should be granted.

IRA LLOYD LETTS,
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E. H. LANGE,
RUSSELL VOERTMAN,
Counsel for Petitioner.

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Respondents

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions Below

Reference to the opinions below is made in the petition, page 2.

II

Jurisdiction

The statutory provisions under which the jurisdiction of this Court is invoked are shown in the petition, page 2.

III

Statement of the Case

This appears in the petition, pages 4-10.

IV

Specification of Errors to Be Urged

Errors to be urged are those specified in the petition, pages 3 and 4, under the heading "Questions Presented."

V

ARGUMENT

(1) The court below has decided federal questions in a way probably in conflict with applicable decisions of this Court.

While petitioner does not contend that the precise questions presented here, clearly federal in character, were considered and decided by this Court in *Central States Electric Company* v. *City of Muscatine,* 324 U. S. 138, it is contended that the decision of the court below is in conflict with the principles upon which this Court's decision in that case rests. In the *Central States* case, this Court said (p. 145):

> We are of opinion that the court below lacked jurisdiction to adjudicate the question of the consumers' rights in the fund in dispute. *United States* v. *Morgan,* 307 U. S. 183, on which the respondents rely, is obviously distinguishable. There, the fund impounded was part of the charges paid to the stockyard merchants by persons who had been charged the rates found by the Secretary of Agriculture to be excessive. Here, since the fund represents a portion of sums paid by Central to Pipeline out of Central's funds and pursuant to contract with Pipeline, the

> *Morgan* case would be authority for repayment to Central. This is true also of *Inland Steel Co.* v. *United States,* 306 U. S. 153. Moreover, if Central had paid Pipeline the excessive rates, the latter could not have defended a suit by Central to recover the excess on the ground that Central had passed on the burden to its customers.[8]

Here, the court below imposes on Panhandle the expense of distributing the fund to consumers on the theory that it has jurisdiction to adjudicate the question of the consumers' rights in the fund and to make a distribution to consumers on the basis of such adjudication. It cites in support of its decision *United States* v. *Morgan,* 307 U. S. 183, and *Inland Steel Co.* v. *United States,* 306 U. S. 153 (R. 492); two cases which this Court specifically distinguished in its opinion in the *Central States* case.

The court below also relies upon its finding (R. 491) that:

> Most of these distributors, which bought gas at wholesale from Panhandle and sold it at retail to ultimate consumers, have disclaimed any interest in the funds impounded and have agreed that so much of the funds as was derived from the sales of gas to them by Panhandle belongs to their customers.

Surely, these disclaimers on the part of these distributors, from whom Panhandle collected the impounded funds, can not confer on the Circuit Court of Appeals jurisdiction, which it would not otherwise have, to impose on petitioner the cost of administration of this benefaction granted by such distributors.

The court below has invited the views of local state regulatory commissions (R. 451-455; 478-488) and is proceeding

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[8] *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.,* 245 U. S. 531.

on the theory that, after hearings, it will adopt a plan of distribution, determining what classes of consumers will be included and the extent to which each class will participate. In effect, the court below is engaging in retroactive local rate-making on a broad scale, contrary to the holding of this Court in the *Central States* case (324 U. S. 138, 143-144).

There is no provision in the Natural Gas Act which supports the action of the court below. In the *Central States* case, this Court, at page 144, said:

> The Natural Gas Act clearly discloses that, though its purpose may have been to protect the ultimate consumer at retail, the means adopted was limited to the regulation of sales in interstate commerce at wholesale, leaving to the states the function of regulating the intrastate distribution and sale of the commodity. That Congress intended to leave intrastate transactions to state regulation is clear,—not only from the language of the Act,[5] but from the exceptionally explicit legislative record,[6] and from this Court's decisions.[7]

Petitioner recognizes that the court below has the problem of disposing of a large fund in its hands, but, if, in order to effect a disposition, the Circuit Court of Appeals decides to supply by judicial legislation what is absent in the congressional scheme of legislation, petitioner may not lawfully be required to bear the expense of effectuating such judicial legislation.

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[5] See, e. g., § 2 (8), 15 U. S. C. § 717 (a) (8); § 5 (a), 15 U. S. C. § 717d (a); § 13, 15 U. S. C. § 717i; § 14a, 15 U. S. C. § 717m (a); § 15a, 15 U. S. C. § 717n (a), 15 U. S. C. § 717 (p).

[6] H. R. No. 709, 75th Cong., 1st Sess., pp. 1-3.

[7] *Public Utilities Commn.* v. *United Fuel Gas Co.*, 317 U. S. 456, 467; *Federal Power Commn.* v. *Hope Natural Gas Co.*, 320 U. S. 591, 609-610.

We submit that Judge Riddick, in his dissent below, clearly stated the law applicable to the facts presented here. He said, in part (R. 495-496):

> **The fund in court is money paid in by Panhandle which, but for the stay order, would have been retained by the distributors of gas at retail who purchased it from Panhandle at wholesale. The fund may, therefore, be regarded as the accumulation of payments made by these distributors, which, in turn, have collected the money from their retail customers under local rates established by State authority, lawful when the collections were made and throughout the period of the accumulation of the fund in court.**
>
> **It follows that the fund is in law the property of the distributors in the proportion in which they contributed to it. Panhandle has received the fund from the distributors in violation of the order of the Federal Power Commission, and is by law obligated to return it to them. The purpose of impounding the fund in the hands of the court was to insure that this legal obligation of Panhandle would be promptly met in the event the order of the Federal Power Commission was sustained by the courts. During the accumulation of the fund Panhandle has never been under any enforceable legal obligation to the customers of the distributors nor does such an obligation now exist.**
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> **If now the distributors and their customers, by agreement among themselves, decide that the share in the fund allotted to any distributor may be distributed among its customers, the ultimate consumers, the expense of such a distribution may not be imposed upon Panhandle.**

(2) The court below has decided important questions of federal law which have not been, but should be, settled by this Court.

The preceding discussion (pages 14-17), indicates clearly the nature of the federal questions presented here and that

they have not been settled by any decision of this Court. Their importance in connection with review of rate reduction orders of the Federal Power Commission under the Natural Gas Act is obvious, and it is submitted, without laboring the point further, that these questions should be settled by a definitive decision of this Court.

(3) The decision of the court below is in conflict with the decision of the United States Circuit Court of Appeals for the Seventh Circuit on the same matter.

The judgment of the lower court is in conflict with the decision rendered by the Circuit Court of Appeals for the Seventh Circuit in *Federal Power Commission* v. *Natural Gas Pipe Line Company of America,* 129 F. (2d) 515, wherein, without objection from any party in interest except Central States Electric Company, the Circuit Court of Appeals directed distribution to ultimate consumers served by the local utilities of a fund representing overcharges collected by the Natural Gas Pipe Line Company of America pending review of a rate reduction order entered by the Federal Power Commission. The court said (p. 516):

> Under the facts in this case, we are unable to say that the petitioners should be charged with the expenses of distribution. They did not deal with the consumers, although the gas they sold was known by them to be for the consumers who would undoubtedly pay the bill for it. The public utility was merely a conduit whereby the natural gas, mixed with other gas, was to be delivered to the consumers, who were to pay a price therefor, fixed by the utilities, after approval by the Illinois Commerce Commission. Under all the circumstances, *we do not believe that it would be equitable or just to require the petitioners to pay any of the expenses incident to the distribution of said fund.* (Emphasis supplied.)

In its order directing distribution in that case, the Circuit Court of Appeals made the following finding (131 F. (2d) 137, 138):

> (1) That the moneys, amounting to $6,377,913.52, *less the Clerk's statutory fees of 1% and costs and expenses of distribution,* belong to the eligible ultimate consumers of the several utilities involved and should be so distributed; that none of the utilities is entitled to such funds. (Emphasis supplied.)

Thus, the decision of the court below is in clear conflict with the holding of the Circuit Court of Appeals for the Seventh Circuit on the same matter. The only distinction between the two cases lies in the fact that Natural Gas Pipe Line Company enjoyed the use of the money represented by its overcharges while the Commission's rate reduction order was under review and, after the order was sustained, brought the money into court in order to discharge the bond which it had given (without surety) to obtain a stay of the Commission's order; whereas, in the case at bar, Panhandle did not have the use of the money but made monthly deposits with the custodian appointed under its stay order sufficient to cover the excess charges as they were collected, and the custodian invested these funds under the Court's direction as they were received. If this factual distinction can have any bearing at all, it can only serve to make more glaring the conflict between the two circuits on the fundamental question presented.

(4) The court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the court's power of supervision.

We approach this subject of our argument with the highest respect for the learned judges who sat below but we sub-

mit that the Circuit Court of Appeals, by imposing upon petitioner the major portion of the cost of distribution to consumers, has abused its discretion and so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The court below stated in its opinion (R. 491) that the cost of distribution to consumers "will exceed $1,000,000, and conceivably may run into higher figures." The report of the Custodian filed March 1, 1946 (488-A) showed the estimated cost of distribution to consumers to be $1,157,150. He had previously reported the amount of earnings on the fund to be $344,925.63 (R. 442).

Petitioner's position in this regard is not inconsistent with either the views expressed by Mr. Justice Black or those expressed by Mr. Justice Douglas in their dissenting opinions in the *Central States* case. Mr. Justice Black said (324 U. S. 138, 149-150):

> Ultimate consumers can secure benefits from a federal rate reduction in two ways: (1) by using the order to get reduced rates before their local regulatory bodies; (2) by the impounding of funds for their benefit if a judicial stay of the federal reduction order is granted. The stay deprived these local consumers of a chance to use the Commission's order to obtain a local rate reduction.

Here, the entire amount of the reduction in petitioner's rates to its distributing utilities was preserved and impounded with the Court's Custodian and is available for the benefit of the consumers if it can lawfully be distributed to them. It is hardly to be supposed that, if the federal rate reduction order had not been contested, local consumers would have received *immediately* reductions in local rates *in the full and exact amount* of the reduction in the wholesale rates. Every one of Panhandle's distributing

utilities (approximately 52 in number, R. 170-171) would have faced the alternative of a voluntary reduction or a local rate case. In making voluntary rate reductions, the corporate officials of the distributing utilities would have been compelleed to consider many elements of the business of local distribution of gas other than the wholesale cost of such gas and, necessarily, would have considered the effect of the war and other economic factors on their future earnings. Whether reductions in local rates would have been made and, if made, the extent and effective date thereof are matters of pure speculation. It is fair to assume that the aggregate of the consumers' savings, during the impoundment period, by reason of voluntary, or enforced, local rate reductions, would have fallen far short of the full amount of the fund impounded under the stay order in this case.

Thus, it is apparent that, if the consumers are entitled to receive distribution directly by the court, the stay order, by its preservation of the entire savings in the cost of gas to the local utilities during the impoundment period, has been a distinct benefit to the consumers. We submit that the court below abused its discretion in failing to recognize this and imposing upon petitioner the cost of distribution to consumers on the theory that the consumers have a vested right to every penny of the impounded fund.

Mr. Justice Douglas, in his dissenting opinion in the *Central States* case, holds that "the federal court which has this fund has considerable discretion in its management," but he also said (324 U. S. 138, 152):

> If there had been no stay order entered and the interstate rate from the Pipeline company to petitioner had been reduced when the Federal Power Commission entered its order, it still would have taken action by the local authorities to reduce the rates in these Iowa cities.

The requirement that petitioner bear the major portion of the expenses of distribution of the impounded funds to the ultimate consumers, in practical effect, operates as an unconstitutional restraint upon the right of access to the courts. Such a requirement is, in its essence, a penalty so severe and drastic as effectually to discourage any natural-gas company from resorting to the courts for review of an order of the Federal Power Commission directing a reduction in the company's rates. The cost of securing a review of the Commission's order under such circumstances would be, and is in this instance, so utterly prohibitive as to constitute, for all practical purposes, a bar to the right of review reserved in the Act. While there are many instances where one who refuses to pay, when the law requires that he shall, acts at his peril (in the sense that he must be held to the acceptance of any lawful consequences attached to the refusal), Mr. Justice Cardozo, speaking for the Court in *Life and Casualty Insurance Company* v. *McCray*, 291 U. S. 566, 574-575 said:

> The price of error may be so heavy as to erect an unfair barrier against the endeavor of an honest litigant to obtain the judgment of a court. In that event, the Constitution intervenes and keeps the courtroom open. *Ex Parte Young*, 209 U. S. 123; *Wadley Southern R. Company* v. *Georgia*, 235 U. S. 651.

A review of the Commission's rate reduction order unaccompanied by a stay of its enforcement would have afforded petitioner none of the protection to which it was reasonably entitled under the circumstances.

In *Scripps-Howard Radio* v. *Federal Communications Commission*, 316 U. S. 4, 10, Mr. Justice Frankfurter said:

> If the administrative agency has committed errors of law for the correction of which the legislature has

> provided appropriate resort to the courts, such judicial review would be an idle ceremony if the situation were irreparably changed before the correction could be made.

The court below recognized that Panhandle had substantial ground for seeking review but appeared to feel that a penalty should be imposed as "the price of error." In its opinion (R. 490,492) it said:

> While the question presented by Panhandle in its petition for review of the order of the Commission justified the granting of a stay upon appropriate conditions (*Russell* v. *Farley*, 105 U. S. 433, 438), it developed that the challenged order of the Commission was not invalid.
>
> • • • • • • • •
>
> • • • The implications drawn by Panhandle from the Central States Case relative to the power of this court to condition the stay order as it did, are, we think, unjustified in view of what the Supreme Court has ruled in *Russell* v. *Farley*, supra (105 U. S. 433, 438); *Meyers* v. *Block* (120 U. S. 206, 214); *Inland Steel Company* v. *United States* (306 U. S. 153, 156-158); and *United States* v. *Morgan* (307 U. S. 183, 191, 193-194, 197-198).

When one considers the factual situations presented in the four decisions relied upon by the lower court in justification of its imposition of the condition in question, it is evident that these cases are distinguishable, as pointed out by this Court in the *Central States* case, 324 U. S. 138, 145 and that such requirement is not an "appropriate" condition.

The imposition of the disputed condition in the present case does not exhibit a sound judicial discretion exercised in conformity with equitable principles; it constitutes an abuse of discretion, because the condition is immoderate and oppressive in its consequences and the limits of a fair dis-

cretion have been exceeded. (*Landis* v. *North American Company*, 299 U. S. 248.)

VI

Conclusion

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

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APPENDIX

The pertinent provisions of the Natural Gas Act of 1938, c. 556, 52 Stat. 821 (15 U. S. C. § 717 *et seq.*) are as follows:

Section 1. (a) As disclosed in reports of the Federal Trade Commision made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

* * * * * * *

Sec. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant

any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon rea-

sonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearing, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Fixing Rates and Charges; Determination of Cost of Production or Transportation

Sec. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

* * * * * * *

Rehearings; Court Review of Orders

Sec. 19. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which

such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the

satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

INDEX

CITATIONS

716139—46

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 275

PANHANDLE EASTERN PIPE LINE COMPANY,
PETITIONER

v.

FEDERAL POWER COMMISSION, CITY OF DETROIT, COUNTY OF WAYNE, MICHIGAN, MICHIGAN CONSOLIDATED GAS CO., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 489–496) is reported at 154 F. 2d 909.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 5, 1946 (R. 497–498). The petition for a writ of certiorari was filed on July 5, 1946. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In a proceeding in the Circuit Court of Appeals to review and set aside a rate-reduction order of the Federal Power Commission, a natural-gas company sought and was granted a stay of the order pending review thereof. The stay was conditioned upon the requirement that the company bear the cost of distributing to the ultimate consumers the funds accumulated pursuant to such stay. The stay order did not require the company to pay interest on such funds. The rate-reduction order having been reviewed and upheld by the Circuit Court of Appeals and by this Court, the natural-gas company sought to have the Circuit Court of Appeals modify the stay order so as to relieve it of its obligation to pay the cost of distributing the funds to ultimate consumers. Distributing companies disclaimed their rights in such funds and admitted that ultimate consumers were entitled thereto. The Circuit Court of Appeals refused to modify its stay order, except to provide that the natural-gas company could apply against distribution costs the earnings on the funds distributed.

The question presented is whether in those circumstances, the order of the Circuit Court of Appeals refusing to modify its stay order so as

to relieve the natural-gas company from the requirement that it pay the distribution costs amounted to an abuse of discretion.

STATEMENT

The Federal Power Commission ("Commission") on September 23, 1942, issued an order requiring Panhandle Eastern Pipe Line Company ("Panhandle") [1] to reduce its rates and charges subject to the jurisdiction of the Commission to reflect a reduction in gross operating revenues, based on 1941 operations, of not less than $5,094,384 *per annum* (R. 37–42).

When the Commission denied Panhandle's motion for rehearing and its application for a stay pending court review (R. 42–53), Panhandle applied to the Circuit Court of Appeals for a stay of the Commission's order (R. 53–74). On November 2, 1942, that court issued an order directing respondents to show cause why a stay should not be granted, and suspended the Commission's order until the question of the stay had been determined (R. 74–75).[2] It was urged in opposition to the proposed stay that as a result thereof

[1] The original order was also directed against Illinois Natural Gas Company and Michigan Gas Transmission Corporation, which were merged with Panhandle on May 31, 1943.

[2] On November 14, 1942, the court denied without prejudice Panhandle's application for a stay upon the ground that its appeal had not been perfected (R. 85–86). Panhandle perfected its appeal on November 18, 1942 (R. 1), renewed its request for a stay (R. 86–88), and on November 23, 1942, the court granted a temporary stay (R. 118).

distributing utilities would be unable voluntarily to reduce rates to ultimate consumers to reflect the reduced cost of gas under the rate-reduction order and that State regulatory authorities would also be unable to order a reduction in local rates commensurate with the reduced cost of gas to the distributing utilities.[3] Alternatively, it was urged that if a stay were granted the court should condition it by requiring that Panhandle pay the expenses of distributing accumulated funds to ultimate consumers, in the event that the rate-reduction order should be sustained (R. 84–85, 115).

On December 7, 1942, the Circuit Court of Appeals stayed the Commission's rate-reduction order, the stay order providing that (R. 119–120):

> 1. The monthly difference between payments to petitioners under existing rates or arrangements and those required under the order of the Commission shall be promptly paid over to * * * the custodian of this Court, * * * to be held by him for the benefit of the ultimate consumers or of petitioners as in this litiga-

[3] In opposing the stay, Michigan Consolidated Gas Company, which served over 700,000 ultimate consumers, and was the largest gas distributing company supplied by Panhandle, argued that (R. 115):

"* * * it would seem that there is no valid reason for impounding millions of dollars of funds which belong to and must be returned at great expense to an already overburdened public."

tion may be determined entitled thereto. * * *

2. The entire expenses of impounding (including, among other things, protecting, investing and distributing to petitioners or to ultimate consumers) of these funds shall be borne by petitioners. Whether any earnings on such funds (while so impounded) may be applied upon such expenses is reserved for future determination. * * *

3. No interest shall be charged petitioners upon such impounded funds unless allowed upon application hereafter made by respondents or any of them. * * * Any interest allowed hereafter shall be at the rate of four percentum annually * * *.

4. Full power and jurisdiction is reserved to cancel or modify this order and to enter any other orders (with or without application of the parties) to protect or to promote the rights and interests of the parties to this litigation and of the ultimate consumers financially interested in the impounded funds.

While the question was pending in the courts, Panhandle made the required monthly deposits with the custodian and a fund amounting to $24,858,954.72 has been accumulated (R. 169–171).[4] On April 2, 1945, the Commission's order

[4] The total monthly deposits made pursuant to the stay order was $24,307,475.99; an additional amount of $551,478.73 was paid to the custodian by Panhandle.

was affirmed by this Court and the matter was remanded to the court below (R. 144–146). *Panhandle Co.* v. *Federal Power Commission,* 324 U. S. 635. Panhandle thereafter filed new schedules of rates and charges with the Commission containing rates and charges reflecting the ordered reduction (R. 167–168, 170–171).

On December 12, 1945, the Circuit Court of Appeals, upon the petition of the United States which claimed a substantial interest in the fund as an ultimate consumer of natural gas and as an indirect consumer through its war contracts (R. 147–163), issued an order requiring the original parties to the proceeding, the interveners, and distributing utilities to show cause why the impounded funds should not be distributed to the ultimate consumers of the distributing utilities (R. 146–147). In response thereto, distributing utilities whose purchases from Panhandle during the impoundment period were associated with refunds amounting to approximately $20,000,000 filed disclaimers of all interest in the fund on the condition that they thereby not incur any liability for state or federal taxes or for expenses of distribution; claims for refunds were filed by a few distributors; the others made no response.

In its response to the show cause order of December 12, 1945, Panhandle sought to invoke the power reserved to the court to modify the stay order by requesting relief from those terms

of the original stay which obligated it to pay the cost of distributing the funds to ultimate consumers (R. 164–166). Hearings were held on Panhandle's petition on March 1, 1946 (R. 448–474),[5] and on April 5, 1946, the Circuit Court of Appeals, Judge Riddick dissenting, refused to relieve Panhandle of the costs of distributing the fund to the ultimate consumers, which were estimated at $1,157,150, but modified the stay order so as to apply the earnings of the fund, then amounting to $344,925.63, against the distribution expenses (R. 489–496).

ARGUMENT

1. In seeking review of the Circuit Court of Appeals' refusal to relieve it of the costs of distributing the accumulated funds to the ultimate consumer, Panhandle does not deny that a court in granting a stay has discretion to impose "terms and conditions upon the party at whose instance it proposes to act" (*Russell* v. *Farley*, 105 U. S. 433, 438; *Meyers* v. *Block*, 120 U. S. 206, 214; *Inland Steel Co.* v. *United States*, 306 U. S. 153, 156, 157; *United States* v. *Morgan*, 307 U. S. 183, 197–198), nor that it is a common condition of such stays to require the petitioner to pay the resulting costs and expenses. See, e. g., Rule 36 of the Rules of this Court; Rule

[5] Two of the members of the court which entered the original stay order sat at these hearings, but in an advisory capacity only (R. 495).

73 (d), F. R. Civ. P.; cf. *Arkadelphia Milling Co.* v. *St. Louis Southwestern Ry.*, 249 U. S. 134, 145–146; *Martin* v. *Clarke*, 105 F. 2d 685, 687 (C. C. A. 7), and cases cited; *United States Fidelity and Guaranty Co.* v. *Jones*, 49 F. 2d 559, 562–563 (C. C. A. 7). But Panhandle does question (Pet. 19–20, 23–24) the requirement by the court below that it "hold harmless the ultimate distributees of these funds from the costs and expenses attributable to the granting of the stay which Panhandle sought and which this Court could have denied" (R. 494). In the circumstances of this case, however, we submit that this requirement could not possibly constitute an abuse of discretion.

Panhandle sought the stay for its own benefit to insure it against "irrevocable loss" (R. 69) in case it were successful in reversing the Commission's order, for, as alleged in its petition, if the order were not stayed, the difference between the old rates and the new reduced rates would probably have been dissipated among the hundreds of thousands of consumers served by its customer-distributing utilities and therefore would be recoverable, if at all, only through a multiplicity of suits and at prohibitive expense (R. 68–69). Panhandle had further suggested that the stay, if granted, should provide for the return of the impounded funds to ultimate consumers, as well as others named (R. 71–72).[6]

[6] Panhandle's present contention (Pet. 20–21) that the distribution costs be paid from the impounded fund attempts

The effect of thus maintaining the *status quo* for Panhandle's protection was to postpone, until after court review, all possibility that distributing utilities might voluntarily and immediately reduce rates to ultimate consumers as Panhandle feared (R. 68–69). Moreover, the stay prevented State regulatory agencies as well as ultimate consumers during the period of litigation, from attacking as "unlawful" the local distribution rates based on the reduced cost of purchased gas. Cf. *United States* v. *Morgan, supra,* at 193, 194; *Ex parte Lincoln Gas Co.,* 256 U. S. 512, 516–517. Such reductions in local distribution rates to reflect savings in the cost of gas ordered by the Federal Power Commission, whether made voluntarily or by order of a State regulatory agency, would apparently have been made promptly and without litigation, as is indicated by the large number of disclaimers filed by the distributing utilities (R. 262–343).

Although rules of various courts require that a party granted a stay pay not only damages for delay but interest on the monies involved as well (Rule 36 of the Rules of this Court; cf. *Arkadelphia Milling Co.* v. *St. Louis Southwestern Ry.,* 249 U. S. 134, 147; *Ex parte Lincoln Gas Co.,* 256

to shift the costs to the ultimate consumers who neither sought, nor benefited from, the stay. The argument urged by Panhandle, based on the lack of privity of contract with the ultimate consumers, is unsound. Cf. *Ex parte Lincoln Gas Co.,* 256 U. S. 512, 517–518.

U. S. 512, 517; *Natural Gas Pipeline Co.* v. *Federal Power Commission,* 129 F. 2d 515 (C. C. A. 7)), the court below did not require Panhandle to pay interest on the impounded funds, as it might reasonably have done—a requirement which, as pointed out by the court below, "might well have been more burdensome than the requirement that [Panhandle] pay the expenses of distribution" (R. 494). Moreover, the estimated costs of distribution, less the earnings on the fund, are only 3.15 percent of the total fund of almost $25,000,000 accumulated under the stay.

Considering these circumstances, the requirement of the court below that Panhandle pay these distribution costs was not only not an abuse of discretion, but was eminently fair and reasonable.

2. As pointed out by the court below, the conditions upon which the stay was granted—that the difference between the then existing rates and those required under the Commission's order be accumulated "for the benefit of the ultimate consumers",[7] and that Panhandle bear "The entire expenses of impounding (including, among other things, protecting, investing and distributing to petitioners or to ultimate consumers) * * *"—were at that time "acceptable to, and were accepted by, Panhandle" (R. 490, 494). Although

[7] Panhandle in its petition for stay suggested that the funds be impounded, "such amounts to be returned to such ultimate consumers of gas or other persons, firms or corporations to whom this Court shall find the same should be returned * * *" (R. 71–72). See, *supra*, p. 8.

Panhandle was aware of the burden it was assuming, it neither objected to, nor sought relief from, these conditions in the Circuit Court of Appeals. Nor did it seek review of these conditions in this Court as part of its review of the Commission's rate reduction order. See the Petition in No. 296, Oct. T. 1944. Cf. *The Scotland,* 118 U. S. 507, 519; *Citizens' Bank* v. *Cannon,* 164 U. S. 319, 323. Instead, during the three years that review of the Commission's order was pending in the court below and in this Court, Panhandle enjoyed the benefits of the suspension of the Commission's order; now that the litigation is ended, Panhandle seeks review of the court's requirement, imposed in the exercise of its discretion at the inception of this litigation, that, as a condition of the stay, Panhandle bear the distribution costs. Cf. *Inland Steel Co.* v. *United States, supra,* at 156–157. Incorporation of such a condition in a stay order, involving only the exercise of discretion, is not separately reviewable. *Newton* v. *Consolidated Gas Co.,* 265 U. S. 78, 82–83, and cases cited. Moreover, refusal to modify the original stay order at this late stage does not give rise to an independent proceeding supplemental to the original proceeding. Review of such refusal thus appears foreclosed.[8] Cf. *Kansas City Southern*

[8] In the light of the full judicial review already had (143 F. 2d 488; 324 U. S. 635; 325 U. S. 834, 892), Panhandle's present claim that the condition of the stay "in practical effect, operates as an unconstitutional restraint upon the right of access to the courts" (Pet. 22), is clearly without substance, and might fairly be characterized as frivolous.

Ry. v. *Guardian Trust Co.*, 281 U. S. 1; *Canter* v. *American Insurance Co.*, 3 Pet. 307, 317.

3. The decision below does not run counter to *Central States Electric Co.* v. *City of Muscatine*, 324 U. S. 138. In that case, this Court held that where a distributing utility claimed the right to participate in the distribution of the accumulated fund to the exclusion of its customers, the Circuit Court of Appeals was without authority to determine the rights of such customers *vis à vis* the distributing utility upon the ground that such a determination constituted rate making. Here, no such issue is or could be raised, since the court below has not undertaken to resolve any such conflicting claims. Nor is any question of rate making involved in the refusal by the court below to modify its stay order. Moreover, prior to the decision of this Court in the *Central States* case, the Circuit Court of Appeals for the Seventh Circuit in *Natural Gas Pipeline Co.* v. *Federal Power Commission*, 129 F. 2d 515—the case which gave rise to the issue in the *Central States* case—had held, in the exercise of its discretion, that in the circumstances there presented the company should not be required to bear distribution expenses.

Nor does the decision of the court below conflict with that of the Circuit Court of Appeals for the Seventh Circuit in the *Natural Gas Pipeline* case. There the stay bond was filed "to secure the refund to purchasers at wholesale of

the amounts respectively due them if the Court should sustain the reduction of rates ordered by the Commission," and the distribution costs were neither imposed upon nor voluntarily assumed by the utility as part of the original stay bond. The court there recognized that it was "directed by [*United States* v. *Morgan,* 307 U. S. 183] to apply equitable principles and to produce and accomplish results which are fair and equitable;" it first charged the company with interest on the accumulated fund, and then held that "Under the facts in this case, we are unable to say that the petitioners should be charged with the expenses of the distribution." 129 F. 2d at 516.

In the present case, however, the funds from the start were to be held "for the benefit of the ultimate consumers"; the stay order sought by Panhandle initially imposed the expenses of distribution on it; and Panhandle was relieved of interest payments which the court below found "might well have been more burdensome than the requirement that it pay the expenses of distribution" (R. 494). "Under the facts in this case," the refusal of the court below to relieve Panhandle from its obligation to pay the distribution costs was a proper exercise of discretion. The court below and, in the *Natural Gas Pipeline* case, the Circuit Court of Appeals for the Seventh Circuit, were confronted with a practical problem of judicial administration, requiring the exercise of discretion. Although each court imposed

slightly different requirements on the company which was granted a stay pending court review, the conclusions arrived at in each case—that the company bear a reasonable portion of the "damages for delay"—are substantially the same.

CONCLUSION

The decision of the court below was correct, reasonable in the circumstances, and obviously no abuse of discretion. There is no conflict, and no need for further review of one phase of an already protracted litigation. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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